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No. 94-192

IN THE

Supreme Court of the United States

October Term, 1994

DAN E. MOLDEA,

Petitioner,

v.

THE NEW YORK TIMES COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Can evaluative, subjective statements of literary criticism be actionable — consistent with the First Amendment — when those statements contain no provably false facts and are fully supported by the critiqued work?

Does the rule of *Milkovich v. Lorain Journal Company*, 497 U.S. 1 (1990), require a reviewing court to ignore the context of language in assessing whether that language is verifiable?

PARTIES TO THE PROCEEDINGS

Respondent The New York Times Company has no parent company and no publicly traded affiliates or subsidiaries.

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BRIEF IN OPPOSITION

Respondent The New York Times Company ("*The Times*"), publisher of *The New York Times*, respectfully prays that the instant Petition be denied. The unanimous decision below reflects nothing more than the unremarkable application of centuries of common sense and common law. This accumulated wisdom prohibits recovery of damages for defamation based upon nonverifiable interpretations of a literary work, particularly when those interpretations appear — as here — in a book review. There is no conflict in the Circuits regarding this principle. There is no special or important reason to grant the Petition under Supreme Court Rule 10. The Petition should be denied.

STATEMENT OF THE CASE

This lawsuit for libel and invasion of privacy arises from a book review ("the Review") written about Petitioner's book, *Interference: How Organized Crime Influences Professional Football* ("*Interference*"), and published in the Book Review section of *The New York Times* on September 3, 1989.

The Review, authored by veteran sportswriter Gerald Eskenazi, offered some positive comments about *Interference*, including the assessment that "there is some really hot stuff in here," but concluded that despite its strengths, *Interference* was marred by "too much sloppy journalism to trust the bulk of this book's 512 pages — including its whopping 64 pages of notes." *See* Review.[1] Eskenazi supported his opinion with illustrations from the book, including Moldea's misspelling of the names of prominent sports figures and his mischaracterization of certain people and events in football lore.[2]

Nearly a year later, Moldea sued *The Times*, disputing the Review's conclusion and quarreling with its examples. After preliminary discovery, *The Times* moved for summary judgment based solely on the language of the Review and the book. The district court (per Chief Judge John Garrett Penn) granted *The Times*' motion, finding that the Review's conclusion of "too much sloppy journalism" was "an unverifiable opinion," and that each example used in the Review was "either a supported statement of fact or a nonverifiable opinion . . . ." *Moldea v. New York Times Co.*, 793 F. Supp. 335, 337 n.3 (D.D.C. 1992).

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1. The Review is reproduced in its entirety in *Moldea v. New York Times Co.*, 15 F.3d 1137, 1151-52 (D.C. Cir. 1994) ("*Moldea I*") (appendix); *Interference* was lodged by Petitioner.

2. Other book reviews critiqued *Interference* far more harshly than *The Times*. *See, e.g.*, Frank Fitzpatrick, *Looking for ties between football, gambling and the mob*, THE PHILADELPHIA INQUIRER, Sept. 3, 1989, at 4J ("The germ of a compelling story is there, but in Moldea's hands the germ grew into a virus. As a result, Moldea has created little more than a litany of circumstantial evidence, citing countless examples of organized-crime figures' connections with the NFL. Those looking for a smoking gun will be sadly disappointed, perhaps as disappointed as those with an appreciation for good writing."); Sandy Smith, *The NFL and the Mob: Who Calls the Plays?*, THE WASHINGTON POST, Oct. 29, 1989, Book World at 6 ("Moldea dug deep, but sad to say, he came up short. Actual evidence is scant in his book. He does, however, manage to package the fog of suspicions, rumors, allegations and accusations that have enveloped pro football over the years . . . ."); Desiree Ward, *Don't let this interfere*, THE MILWAUKEE JOURNAL, Aug. 31, 1989 ("Don't buy this book. Don't borrow this book. Don't swap anything for this book. If it's too late and one of the above has already taken place, put the book down and don't read it.").

Petitioner appealed. Circuit Judge Harry T. Edwards, joined by Circuit Judge Patricia A. Wald, reversed the district court's grant of summary judgment. Chief Judge Abner J. Mikva dissented. *See Moldea v. New York Times Co.*, 15 F.3d 1137 (D.C. Cir. 1994) ("*Moldea I*"). The court examined the "focal point" of the Review — that *Interference* contains "too much sloppy journalism" — and concluded that it could be held nonactionable only if it were supported by true facts. *Id.* at 1141, 1146. The court found that "[s]ome of the factual evidence with which *The Times* review supports its assertion that *Interference* is 'sloppy' is plainly true," including that: (1) the book contains "warmed over" material; (2) a key fact is buried in a footnote; and (3) the names of several prominent sports figures are misspelled. *Id.* at 1148-49. Of the remaining examples challenged by Petitioner, the court found one to be a supported statement of opinion, but two to be actionable, verifiable statements of fact. *Id.* at 1146-49.

Despite its finding that only two of the six examples supporting the "sloppy journalism" assessment could be found by a jury to be false, and its recognition that three of the examples were true and one was supported opinion, *id.* at 1146-49, the divided panel reversed and remanded the case to the trial court with instructions to consider the substantial truth of the Review.

The two statements that the *Moldea I* court remanded to the trial court — which form the basis for the instant Petition — were the reviewer's subjective interpretations of two passages in *Interference*. The first of the two interpretations stated that Moldea "revives the discredited notion that Carroll Rosenbloom, the ornery owner of the Rams, who had a pen-

chant for gambling, met foul play when he drowned in Florida 10 years ago." *See* Review. This characterization was based on the text of *Interference*, which, for over 35 pages, repeatedly dredged up old rumors and innuendo about Rosenbloom's death[3] before issuing the decidedly tentative one-line statement that: "In short, the evidence *appears to be* clear that Rosenbloom died in a tragic accident and was not murdered." *Interference* at 360 (emphasis added). The other interpretation still at issue after *Moldea I* concerned a meeting described in *Interference* as "suspicious" and in the Review as "sinister":

> Mr. Moldea tells as well of Mr. Namath's "guaranteeing" a victory in Super Bowl III shortly after a sinister meeting in a bar with a member of the opposition, Lou Michaels, the Baltimore Colts' place-kicker. The truth is that the pair almost came to blows after they both had been drinking; and Mr. Namath's well-publicized "guarantee" came about quite innocently at a Miami Touchdown Club dinner when a fan asked him if he thought the Jets had a chance. "We'll win. I guarantee it," Mr. Namath replied.

See Review. This portion of the Review — like the "revives"

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3. *See, e.g.*, *Interference* at 324 ("In the wake of Rosenbloom's funeral, numerous questions arose about the circumstances of his death, which have challenged the contention that he drowned by accident. It was suggested by some that Rosenbloom might have been murdered."; "Could Rosenbloom's death have been anything but an accidental drowning? If it was not, there was a whole cast of characters who would have had the means, opportunity and motive."); *id.* at 325 ("Nevertheless, the rumors of foul play persisted."); *id.* at 358 ("The PBS report also raised questions about the investigation of the accidental drowning of Carroll Rosenbloom, suggesting he might have been murdered.").

language — was fully supported by the text of *Interference*.[4] Nonetheless, the *Moldea I* court concluded that the reviewer's interpretation of the Rosenbloom and Namath-Michaels passages of the book could be actionable.

On reconsideration, Judge Edwards, joined by Judges Wald and Mikva, modified *Moldea I* and affirmed the district court's grant of summary judgment in favor of *The Times*. *Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994) ("*Moldea II*").[5] The court affirmed its earlier findings regarding the three non-actionable examples. *Id.* at 312, 317. It then turned to the remaining two examples, noting that "[t]he key to this case is the question of verifiability." *Id.* at 317. The court found that "given that *Interference* does not reveal that Rosenbloom's death was accidental until 35 pages after giving undeniably titillating hints of homicide. we cannot hold that a reviewer could not reasonably suggest that Moldea sought to 'revive' the notion that Rosenbloom was murdered in order to build suspense be-

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4. The use of the word "sinister" in the Review as a shorthand way to describe the book's treatment of the Namath-Michaels barroom encounter is a fair interpretation of *Interference*. Moldea writes "For years, there have been questions as to whether Super Bowl III was fixed," and follows up this startling statement with a long discussion about Michaels' teammate, Bubba Smith, who claimed that he heard the game had been "set up." *Interference* at 193. After planting the seeds of suspicion, Moldea cultivates them with his portrayal of the Namath-Michaels meeting. "Those who still insist that something about the game was *suspicious* call attention to a meeting between Joe Namath and Lou Michaels . . . ." *Id.* at 197 (emphasis added). He repeatedly refers to Michaels' drinking throughout the evening and makes a point of noting that Namath paid for Michaels' drinks and drove Michaels and a teammate back to their hotel. Thus, the use of the word "sinister" to describe the meeting is supported by the insidious implication laced throughout the passage that an inebriated Michaels made indiscreet statements about the Colts' strength as a team. This implication is buttressed by the insertion of a quote from Michaels himself, who, when asked if he had tipped Namath off to the Colts' defense, issues a sheepish and weak non-denial — "I don't think it's likely . . . ." *Id.* at 198. The passage concludes with a well placed, suggestive link between the meeting and Namath's famous guarantee of victory: "[s]oon after the incident between Namath and Michaels took place, Namath came out publicly and guaranteed the game." *Id.* at 197.

5. Petitioner erroneously states that *Moldea II* reversed *Moldea I* (Petition at 2). In fact, the *Moldea II* court modified the earlier decision. *Moldea II* at 320.

fore disproving that theory." *Moldea II* at 318. Similarly, the court found that the "sinister meeting" language was "simply one of the 'interpretations' offered in support of the review's" central theme and, in any event, was not defamatory on its face. *Id.* at 318. Noting that "Moldea [was] left with only the 'sinister meeting' passage as a possible basis for his defamation claim, and this is a very weak basis indeed," the court concluded: "Because the review relies principally on statements that are true, supported opinions or supportable interpretations to justify the 'sloppy journalism' assessment, we are constrained to find that it is substantially true and therefore not actionable." *Id.* at 318-19.[6]

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6. Petitioner makes much of an amicus brief supposedly "filed" by media organizations in *Moldea II*, but neglects to inform this Court that the motion of amici for leave to file the brief was *denied*. *See* Petition at 25; Order (D.C. Cir. May 2, 1994). He also fails to mention that the court rejected a second amicus effort, submitted not by "the media," but by the Association of American Publishers, Inc. and PEN American Center. Those organizations represent the very publishers and authors whose works are subjected to critical review. Other inaccuracies and omissions in the Petition abound:

- The Review's credit line was not "misleading" (Petition at 6). Eskenazi is a sportswriter who covers baseball. He has also covered professional football, a fact he discloses in the Review itself when he describes himself, tongue-in-cheek, as one of the "loyal sportswriters" whom Moldea believes the NFL will "trot out" to criticize *Interference*.
- *The Times* did not violate any policy or practice by declining to print Moldea's rants about Eskenazi and the Review (Petition at 11). *The Times* is not obligated to publish every letter from a disgruntled author unhappy with a Times review, particularly when the letter is marred by the same fundamental problems that beset the book.
- *The Times* has never "conceded" the issue of actual malice for the purpose of summary judgment or for any other purpose (Petition at 39 n.6). It was unnecessary for the *Moldea II* court to reach the issue of actual malice because *The Times*' dispositive motion was based solely on the language of *Interference* and the Review.
- Petitioner claims that "[s]ales were moving briskly" prior to the Review, and that the impact of the Review was "devastating" (Petition at 8, 10). The only week in which sales of the book were arguably "brisk" was the week ending July 7, 1989. Initial discovery suggests that sales by the publisher apparently plummeted throughout the rest of the summer and then *rose* in the week *following* the Book Review.

REASONS FOR DENYING THE WRIT

THE DECISION IS CONSISTENT WITH SUPREME COURT PRECEDENT AND CENTURIES OF JURISPRUDENCE PROTECTING LITERARY CRITICISM.

Though Petitioner claims that this is "one of the most, if not the most, closely watched libel cases in recent history," its dismissal would have passed virtually unnoticed had it not been for the appellate court's aberrant ruling in *Moldea I*. That ruling has been self-corrected through reconsideration, and this case now is relegated to its proper place among the legion of other failed libel cases arising out of critical commentary.[7] This result is entirely consistent with both our Anglo-American and constitutional preferences for encouraging rather than stifling pointed criticism. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). As one justice on the King's Bench recognized nearly two centuries ago: "Liberty of criticism must be allowed, or we should have neither purity of taste nor of morals." *Tabart v. Tipper*, 170 Eng. Rep. 981, 982 (K.B. 1808).

A. The Lower Court Properly Applied The Law Governing Subjective Interpretations Of Literary Works.

1. The decision reflects a rich cultural and legal heritage that affords breathing space for criticism of literary works.

"There is a long and rich history in our cultural and legal traditions of affording reviewers latitude to comment on literary and other works." *Moldea II* at 315. The value of this commentary, according to the renowned British poet and critic Matthew Arnold, is that it "tends to establish an order of ideas, if not absolutely true, yet true by comparison with that which it displaces; to make the best ideas prevail." Matthew Arnold, *The Function of Criticism at the Present*

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7. This case represents a very small slice of defamation law, and an even smaller slice of "fact v. opinion" jurisprudence — the meaning of two supporting statements in a work of literary criticism. It is hardly the avatar of modern libel law that Petitioner fancies.

Time, *in* ESSAYS IN CRITICISM 6 (1865); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection") (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). This belief in the corrective value of the "marketplace of ideas" found expression across the Atlantic through the oft-quoted dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting): "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution." *Moldea II*, like the collective body of law and logic before it, recognizes that arguments about differing interpretations of a book are best resolved through an exchange of ideas, not subpoenas.

The court in *Moldea II* acknowledged the inherently subjective nature of criticism — particularly criticism that involves the interpretation of literature and art — by holding that such commentary is actionable "only when the interpretations are *unsupportable by reference to the written work*." *Moldea II* at 315 (emphasis in original). This common sense approach harkens back to language penned by this Court over twenty years ago in *Time, Inc. v. Pape*, 401 U.S. 279 (1971). In *Pape*, the Court reversed a libel judgment based on a magazine article about a government report, finding that the article was more descriptive in nature than a "direct account of events that speak for themselves." 401 U.S. at 285. As this Court later observed, the decision recognized "the difficult choices that confront an author who departs from direct quotation and offers his own interpretation of an ambiguous source." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519 (1991); *accord Bose Corp.*, 466 U.S. at 512-13 (refusing to permit recovery for choice of language which, "though reflecting a misconception," was "one of a number of possible rational interpretations" of ambiguous event).[8] The Court explained that "[t]he protection for rational interpretation

8. A book review presents an even stronger basis for protection of interpretations than the article in *Pape*. A reader is more likely to view a critic's interpretation of a book as a subjective assessment than a journalist's description of a government report.

serves First Amendment principles by allowing an author . . . interpretive license . . . ." *Masson*, 501 U.S. at 519 (discussing *Bose*).[9]

Although this Court repeatedly has declined to wade into battles over literary interpretation, it has not granted — nor does the decision reflect — categorical immunity for critics.[10] The court below warned, for instance, "that a critic's interpretation must be rationally supportable by reference to the actual text he or she is evaluating, and thus would not immunize situations . . . in which a writer launches a personal attack, rather than interpreting a book." *Moldea II* at 315. Accordingly, the review would not have been protected if it had "stated or implied that *Interference* was a badly written book because its author was a drug dealer." *Id.* Furthermore, contrary to Petitioner's alarmist rhetoric, the standard of *Bose*, *Pape*, and now *Moldea II*, is limited to subjective interpretations of ambiguous materials.

Petitioner attempts to distinguish *Bose* and *Pape* by arguing that "there is no ambiguity concerning the text of *Interfer-*

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9. By providing room for rational interpretation and interpretive license in commentary, the decision below tracks two important common law antecedents. Courts, including the *Moldea* court, have long afforded protection to so-called "pure" opinion, *i.e.*, opinions based on stated facts. *See, e.g.*, *Moldea I* at 1144-45 ("Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation."). The law of fair comment also protects assessments based on stated facts, and even insulates comments based on *un*stated facts when those facts are publicly available. *See, e.g.*, *Milkovich*, 497 U.S. at 13; *Fisher v. Washington Post Co.*, 212 A.2d 335, 338 (D.C. 1965). In *Fisher*, the court applied the privilege to an art critic's statements that pictures in plaintiff's gallery were "badly hung" and included many "commercial paintings." *Id.* at 337. The court reasoned that the "facts upon which [the critic] based her conclusions were readily accessible to any who wanted to test them," *id.* at 338, just as *Interference* remains readily accessible to anyone who wants to read it.

10. No one doubts that a book review can be actionable. The lower court was correct — and the Times has never disputed — that a book review has no automatic immunity from libel suits and that a false, verifiable fact, even in a review, can be actionable. However, "[a]s a general principle, authors, journalists, and artists invite criticism of their work product, and . . . the mainstream position is clearly to construe such criticism as opinion or fair comment." RODNEY A. SMOLLA, LAW OF DEFAMATION § 6.12[7] (1994).

ence" (Petition at 48). The book shows otherwise. The two examples addressed by the court in *Moldea II* — the Rosenbloom and Namath-Michaels passages — are patently ambiguous, providing just enough grist for the reader to reach the darkest conclusions. As the court explained, "Moldea discusses Rosenbloom's drowning in pages 319 through 326 of his book, closing his account with quoted observations from several of Rosenbloom's friends, who speculate that he was murdered." *Moldea II* at 318. The court emphasized that Moldea did not reach his tentative assessment that Rosenbloom's death was accidental until page 360. *Id.* Based on this belated explanation of the "undeniably titillating hints of homicide," the court found that a reviewer could reasonably "suggest that Moldea sought to 'revive' the notion that Rosenbloom was murdered in order to build suspense before disproving that theory." *Id.* At the very least, this lengthy and ambiguous passage — whatever it may mean — is sufficient to denominate the issue as having been "revived." One common understanding of the word "revive" is to "bring back" or "renew in the mind or memory." *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1984). The text describing the Namath-Michaels barroom encounter is no clearer. *See supra* note 4.

Petitioner's fundamental error lies not in concluding that the Review's characterization of the Rosenbloom and Namath passages was wrong; it is in presuming that there is any right — or, to use the language of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), "verifiable" — interpretation of those turbid passages. To declare, as Petitioner does, that the text of *Interference* — some 512 pages — contains "no ambiguity," is to create a standard of book writing (and smugness) that even our most accomplished authors could never meet. Nor would they want to. The beauty of language, particularly literary prose, is that it affects readers in different ways, and no one holds a monopoly on its meaning or interpretation. Not even its author.

2. The lower court was mindful of this Court's decision in *Milkovich* and the proper role of context in assessing verifiability of language.

Contrary to Petitioner's claims that the lower court eschewed the teachings of *Milkovich*, the *Moldea II* court makes clear that it was firmly guided by Chief Justice Rehnquist's opinion in that case. In decidedly *un*ambiguous terms, the court defined its task as "determin[ing] as a threshold matter whether a challenged statement . . . is verifiable — that is, whether a plaintiff can prove that it is false. . . . *The key to this case is the question of verifiability.*" *Moldea II* at 316-17 (citation omitted) (emphasis added).

The court's unequivocal mission statement parallels the language and spirit of *Milkovich*. In *Milkovich*, a high school wrestling coach claimed that an Ohio newspaper defamed him in a sports column by implying that he had perjured himself in a state court proceeding. The newspaper argued that the challenged statements constituted the author's opinion and therefore could not be actionable. Unpersuaded that "an additional separate constitutional privilege for 'opinion' [was] required" to augment existing First Amendment safeguards, *id.* at 21, the Court refused to craft a "wholesale defamation exemption for anything that might be labeled 'opinion.'" *Id.* at 18. Building on a long line of cases, including *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the Court reaffirmed that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will [still] receive full constitutional protection." *Milkovich*, 497 U.S. at 20.

Faithfully applying these principles, the *Moldea II* decision analyzed the verifiability of the challenged passages and concluded that they were incapable of being proved false. Much like his approach to challenging the Review itself, Petitioner does not like the conclusion, so he quibbles with the analysis. He claims that the lower court improperly substituted its own "supportable interpretation" standard for the verifiability test of *Milkovich* (Petition at 35), and, in so doing, allowed the context of the challenged statements to "trump" the verifiability requirement (*id.* at 36). Neither claim has merit.

Moldea II did not "create" the supportable interpretation standard, as Petitioner suggests (Petition at 35), but borrowed it from a number of well-reasoned decisions of this Court. *See* discussion of *Bose* and *Pape*, *supra*. Moreover, the supportable interpretation standard never eclipses the verifiability test in *Moldea II*; it serves only as a worthy complement — a kind of modern-day sextant to help navigate the sargasso sea of literary interpretation. As the court recognized in discussing the standard, "some materials by their very nature require interpretation, and . . . the First Amendment affords latitude to those engaged in that task." *Moldea II* at 316; *see also Bose*, 466 U.S. at 513 ("the difference between hearing violin sounds move around the room and hearing them wander back and forth fits easily within the breathing space that gives life to the First Amendment"). Even as it struggled with the meaning of language and looked to *Bose* and *Pape* for guidance, the court did so squarely within the contours of what it described as the "key to th[e] case": the "question of verifiability" under *Milkovich*. *Moldea II* at 317.[11]

As with all tests that grapple with the meaning of language, however, the verifiability test recognizes that language cannot be analyzed in a vacuum. A "fundamental principle of . . . language itself [is] that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 113 S. Ct. 1993, 1996 (1993); *cf. Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1178 (1994) (analysis of parody under Copyright Act turns in part on contextual distinction between "[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it."). Mindful of this basic precept, the court below correctly concluded that the *Milkovich* decision does not "abandon[ ] the principle of looking to the context in which speech appears," *Moldea II* at 314, and

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11. In light of the fundamental ambiguity in *Interference*, the court's invocation of the supportable interpretation standard to assist in its verifiability analysis is particularly appropriate. Where a writing "is so ambiguous as this one was, it is hard to imagine a test of 'truth' that would not put the publisher virtually at the mercy of the unguided discretion of a jury." *Pape*, 401 U.S. at 291.

noted this Court's direction that "the general tenor" of the article be evaluated. *Id.* at 313 n.2 (citing *Milkovich*, 497 U.S. at 21).[12]

Thus, in *Masson*, this Court reasoned that the accuracy of quotations could not be determined without reference to context, because "an exact quotation out of context can distort meaning, although the speaker did use each reported word." *Masson*, 501 U.S. at 515. The contextually bound test for inaccurate quotations — like the verifiability test — necessarily rests upon "the meaning a statement conveys to a reasonable reader." *Masson*, 501 U.S. at 515 (any test for quotations that ignored this bedrock principle would be "a departure from the underlying purposes of the tort of libel as understood since the latter half of the 16th century"). The Court found that the contextual factors that "would, or at least could, lead a reader to take the quotations at face value" include the fact that the "work purports to be nonfiction, the result of numerous interviews," and the fact that the *New Yorker* magazine "enjoy[ed] a reputation for scrupulous factual accuracy." *Id.* at 513.[13] If these factors influence the meaning attributed to quotations, then surely the subjective

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12. Interestingly, the *Milkovich* Court itself looked to "tenor and context" in evaluating language. In concluding that the famous "false idea" passage from *Gertz* was not intended to create a wholesale exemption for opinion, the Court noted, *inter alia*, that "such an interpretation [would] be contrary to the tenor and context of the [*Gertz*] passage . . . ." *Milkovich*, 497 U.S. at 18 (construing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)).

13. So-called "rhetorical hyperbole" cases, exemplified by the *Letter Carriers* and *Bresler* decisions reaffirmed by this Court in *Milkovich*, lend further support to the view that language must be understood in context. In *Letter Carriers* and *Bresler*, this Court relied in part on context to find that the terms "scab" and "blackmail" could not reasonably be understood as statements of fact in the respective contexts of a labor strike and a political dispute. *See Moldea II* at 314 ("it is in part the *settings* of the speech in question that makes their hyperbolic nature apparent"); *NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr.*, 1994 Colo. LEXIS 527, at *15 (July 11, 1994) ("In each of those decisions [*Bresler-Letter Carriers-Falwell*], the court expressly considered the statements as a whole, as well as the broader social context in which they arose.").

nature of a book review must bear on the meaning attributed to literary criticism.[14]

Milkovich does not hold otherwise. As the *Moldea II* court explained, context presumably played no part in the outcome of *Milkovich* because the challenged language — the accusation of perjury — was a clear statement of verifiable fact irrespective of its context:

> Although the statements at issue in *Milkovich* appeared in an 'opinion column' in a newspaper sports section, the Court found no relevance in this fact in reaching its decision, apparently because an accusation of perjury is not the sort of discourse that even arguably is the usual province of such columns.

Moldea II at 313. In essence, context in *Milkovich* made little or no difference to the verifiability analysis because the inescapably factual nature of a perjury charge is not the usual stuff of sports columns. By contrast, this case involves the subjective evaluation of a literary work susceptible to varying interpretations, and a context in which "the allegedly libelous statements were evaluations quintessentially of a type readers expect to

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14. This Court's falsity analysis in *Masson* repeatedly refers to the context of both the source material and the quotations drawn from that material. *See Masson*, 501 U.S. at 524 ("Petitioner's other tape-recorded remarks did indicate that he and another analyst planned to have great parties at the Freud house and, *in a context that may not even refer to Freud house activities*, to 'pass women on to each other.' ") ("any difference between petitioner's tape-recorded statement . . . and the quotation . . . is, *in context*, immaterial") (emphasis added).

find in that genre." *Moldea II* at 315.[15] Thus, "*Milkovich* . . . simply 'discounted [context] in the circumstances of that case,' " *Moldea II* at 314 (quoting *Phantom Touring*[16]), circumstances that are not present here.

Nor could the rule be otherwise. Assessing the meaning of language is an inexact science, and divorcing language from its context would make the task infinitely more difficult. As Justice Holmes observed long ago: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

B. There Is No Conflict In The Circuits Regarding The Role Of Context In Assessing The Verifiability Of Language.

1. Courts uniformly examine language in context when determining verifiability.

Contrary to Petitioner's assertion, *Milkovich* has been applied uniformly by the lower courts. Courts have resoundingly rejected the analysis-by-classification approach, and instead focused squarely on verifiability. The Seventh Circuit's Chief

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15. Indeed, Eskenazi's review contains the type of criticism commonly found in book reviews. Eskenazi's criticisms are not unlike those contained in Michael Dirda's 1993 Pulitzer Prize winning review of Daniel J. Boorstin's *The Creators*:

> For the chief problem with *The Creators* lies in the superficiality of its approach to art. Boorstin delivers the received opinion on most works, makes enough mistakes to suggest that he has not read the literary texts recently or attentively, misquotes frequently, cites passages that do not support what he claims . . . .
>
> MISTAKES? *The Creators* is pockmarked with distracting errors of spelling and fact that reveal at the least lack of attention on the part of the author and his editors.

Michael Dirda, *Culture's Greatest Hits*, THE WASHINGTON POST, Oct. 4, 1992, Book World at 5.

16. *See Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724 (1st Cir.), *cert. denied*, 112 S. Ct. 2942 (1992).

Judge, Richard Posner, recently capsulized the implicit role of context in these cases: "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993).

The First Circuit has reached virtually the same conclusion. In *Phantom Touring*, the court found an article describing a theatrical production as a "rip-off, a fraud, a scandal, [and] a snake-oil job" to be "figurative and hyperbolic" commentary, reasoning that "no objective evidence [could] disprove" the statements. The court emphasized *Milkovich*'s protection for statements that "cannot 'reasonably [be] interpreted as stating actual facts' about an individual," and illustrated the *Milkovich* logic with an example apt to the present case: "Thus, a statement such as, 'That's the worst play I've ever seen,' would be protected not because it is labeled an opinion but because it is so subjective that it is not 'susceptible of being proved true or false.' " *Id.* at 727 (citation omitted). Several facts precluded a finding of verifiability, including the fact that the challenged statements appeared in a theater column, "a type of article generally known to contain more opinionated writing than the typical news report." *Id.* at 729.

Other courts carrying out the delicate task of evaluating the meaning of language also have not hesitated to consider context as an aid in determining verifiability. *See, e.g., Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1096 (4th Cir. 1993) ("in context, 'bottom line' . . . connotes 'cutting to the chase,' not an accounting conclusion"); *Gehl Group v. Koby*, 838 F. Supp. 1409, 1416-17 (D. Colo. 1993) (statement charging that the Fraternal Order of Police consists of "the prostitutes of the law enforcement profession" not actionable when construed in context); *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 778, 783 (S.D.N.Y. 1990) (rejecting construction that "divorces the remarks from the context in which they were uttered, and, in the process, badly distorts their semantic content"); *Dworkin v. L.F.P., Inc.*, 839 P.2d

903, 915-16 (Wyo. 1992); *Diez v. Pearson*, 834 S.W.2d 250, 252 (Mo. Ct. App. 1992). Far from the renegade decision painted by Petitioner, the *Moldea II* opinion fits comfortably within this uniform landscape of cases.

2. Even the cases cited by Petitioner considered context as part of the verifiability analysis.

Neither of the cases cited by Petitioner to support his alleged "split" in the Circuits rejected the consideration of context as part of the verifiability analysis. *See Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); *Kolegas v. Heftel Broadcasting Corp.*, 607 N.E.2d 201 (Ill. 1992). In *Rooney*, the factual statement that a windshield treatment " 'didn't work' . . . produce[d] the impression that [television commentator Andy] Rooney [was] maintaining that Rain-X failed to perform as guaranteed, the context of his broadcast notwithstanding." 912 F.2d at 1054. Context was a factor, but — just like the "general tenor" of the column in *Milkovich* — it failed to negate the impression left by the speaker.[17] The Ninth Circuit concluded that whether the product "worked" or not was readily verifiable (like an accusation of perjury), but the case was dismissed because plaintiff had failed to prove that Rain-X worked. *Rooney*, 912 F.2d at 1057.

The Supreme Court of Illinois in *Kolegas*, like the Ninth Circuit in *Rooney*, also looked to context as one consideration among many in its verifiability analysis. There, plaintiff hired a Chicago radio station to advertise a classic cartoon festival that he produced as a benefit for Elephant Man's disease. Plaintiff called the station shortly after the broadcast of one of his advertisements. During the ensuing on-air interview, plaintiff described the purpose of the benefit and provided information about the festival. When plaintiff claimed that his wife and son

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17. Contrary to Petitioner's representation that the *Rooney* court "refused to give weight to" context (Petition at 30), the Ninth Circuit explicitly stated: "In determining whether Rooney's statement is actionable, we 'examine the statement in its totality in the context in which it was uttered or published.' " *Rooney*, 912 F.2d at 1054.

had Elephant Man's disease, the disc jockey allegedly stated, "You're gone," and hung up on plaintiff. Additional on-air comments followed, including the statements that plaintiff was "not for real," that he was "scamming" the station, and that there was "no such show as the classic cartoon festival . . . ." *Kolegas*, 607 N.E.2d at 205.

The court found that "[t]hose statements *can* reasonably be construed as asserting facts; namely, that [plaintiff] was lying and that no festival would take place." *Id.* at 208. Rejecting the argument that the language was mere hyperbole, the court explained that the Supreme Court "has characterized language as 'rhetorical hyperbole' only when that language, in context, was obviously understood as an exaggeration, rather than a statement of literal fact." *Id.* The court then examined the context of the statements:

> those who heard the defamatory remarks may have been more likely to interpret those remarks literally or seriously, because the statements were made immediately after the advertisement promoting the festival was aired.

Id. at 209. These circumstances *supported* the finding that the statements "were obviously intended to be taken literally" despite the comical nature of the program. *Id.*

Thus, contrary to Petitioner's cramped reading of *Rooney* and *Kolegas*, neither case rejects the role of context in assessing verifiability, and neither case generates the so-called "split" in the Circuits that Petitioner imagines.[18]

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18. Of course, statements as to whether a product "lived up to its bottle's claims," *Rooney*, 912 F.2d at 1055, or whether a cartoon festival would take place, are vastly different from the personal evaluation of a book made by a reviewer applying his own standards and values.

C. This Court Should Not Review The Finding Of Substantial Truth.

Based on a misreading of *Moldea II*, Petitioner attempts to convert the court's run-of-the-mill application of the substantial truth doctrine into an unbridled exercise in "procedural non-neutrality." This transformation is more than *Moldea II* can bear. The *Moldea II* court found that the Review's conclusion that the book contained "too much sloppy journalism" was supported by "at least six observations" made in the Review: "the five challenged passages, plus the unchallenged claim that Moldea made several spelling errors." *Moldea II* at 318. As to these six observations, the court applied the *Milkovich* standard and determined that "[a]t least five of these [six] observations could not be proved false at trial, either because they are true, are supported opinion, are reasonable interpretations, or are not challenged . . . ." *Moldea II* at 318. With five of the six examples eliminated as potential fodder for a defamation suit, and the remaining example "not defamatory on its face," *id.* at 318, the court was compelled to the conclusion that "as a matter of law the review is substantially true." *Id.* at 313.

The court's conclusion comports with long-settled precedent. Libel claims should be dismissed if the challenged statements are substantially true, *i.e.*, if the "gist" or "sting" of the statements is correct. *See, e.g., Masson*, 501 U.S. at 517; *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1296 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988). As this Court has explained, "Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' " *Masson*, 501 U.S. at 517; *see also Hepps*, 475 U.S. at 778 ("We recognize that requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so."). Once the *Moldea II* court had completed its analysis of the six examples used in the Review and found five of those examples to be true or otherwise nonactionable, it properly found that the "gist" or "sting" of the Review as a whole was accurate.

Citing *Moldea II*'s statement that one of the six observations from the Review was "close to the line," Petitioner argues that he was "entitled to a finding of non-falsity" as to

that observation, and then bootstraps a claim of pro-media bias from his alleged "entitlement" (Petition at 54-55). Putting aside the fact that Petitioner erroneously attributes the court's "close to the line" comment to the wrong example,[19] the court was unimpressed with the "sinister meeting" language as the *sole* support for a defamation lawsuit. The court termed the passage — now standing alone — a "very weak basis" for a libel action, and concluded that it was not defamatory and not actionable. *Moldea II* at 318.

There is nothing unusual about the court's substantial truth analysis. The decision reflects the neutral, workmanlike application of decades of constitutionalized libel law from *New York Times* to *Hepps*. If a libel plaintiff — like Petitioner — is unable to bear his burden of proof, whether by failure to prove falsity, inability to overcome a substantial truth defense, or lack of defamatory meaning, his case must come to an end.

CONCLUSION

Petitioner's case, which began as a sweeping attack on the Review's conclusion that *Interference* contained "too much sloppy journalism," now has been whittled down to quibbles over the interpretation of two passages in the book. In turn, the interpretation of those two passages —, and the entire fate of this lawsuit — would be reduced by Petitioner to the meaning of two words from a 692-word book review: "revives" and "sinister."

Surely our heritage demands more than an etymological scavenger hunt in these cases. After centuries of jurisprudence providing breathing space for commentary upon literary works, it cannot be that a libel suit challenging a book review turns on whether a court or a jury favors numbered definition 1, 2 or 3 from the latest edition of *Webster's Dictionary*. Lord Ellenborough's reasoning in an early libel case

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19. Petitioner states that the *Moldea II* court found the "revives the discredited notion" statement about Carroll Rosenbloom's death to be "close to the line" (Petition at 54), when the court in fact was referring to the Review's interpretation of the Namath-Michaels meeting. *See Moldea II* at 318.

involving literary criticism, implicitly adopted by the court in *Moldea II*, resonates just as clearly today as it did nearly two centuries ago:

> We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule . . . otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it.

Carr v. Hood, 1 Campb. 354, 357 (K.B. 1808) (reprinted in *Tabart*, 170 Eng. Rep. at 985).

For the foregoing reasons, Respondent The New York Times Company respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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